

1 UNITED STATES DISTRICT COURT
2 WESTERN DISTRICT OF NORTH CAROLINA (Asheville)

3 No. 1:20-cv-00066-WGY

4
5 JANE ROE,
6 Plaintiff,

7 vs.

FILED
ASHEVILLE DIVISION
Jan 25 2021
U.S. District Court
Western District of N.C.

8
9 UNITED STATES OF AMERICA, et al,
10 Defendants

11 *****

12
13 For Zoom Hearing Before:
14 Judge William G. Young

15 Motion to Dismiss

16
17 United States District Court
18 District of Massachusetts (Boston)
19 One Courthouse Way
20 Boston, Massachusetts 02210
21 Monday, November 23, 2020

22 *****

23 REPORTER: RICHARD H. ROMANOW, RPR
24 Official Court Reporter
25 United States District Court
One Courthouse Way, Room 5510, Boston, MA 02210
bulldog@richromanow.com

A P P E A R A N C E S

COOPER J. STRICKLAND, ESQ.

Law Office of Cooper Strickland

P.O. Box 92

Lynn, NC 28750

(828) 817-3703

Email: Cooper.strickland@gmail.com

For Plaintiff

GILL PAUL BECK, ESQ.

RACHAEL LYNN WESTMORELAND, ESQ.

U.S. Department of Justice

1100 L. Street, NW

Washington, DC 20005

(202) 514-1280

Email: Rachael.westmoreland@usdoj.gov

For the United States of America

SHANNON SUMERELL SPAINHOUR, ESQ.

Davis, Hartman, Wright, PLLC

28 Schenck Parkway, Suite 200

Asheville, NC 28715

(828) 771-0833

Email: Mss@dhwlegal.com

For the FDO

1 P R O C E E D I N G S

2 (Begins, 2:00 p.m.)

3 THE CLERK: Now hearing Civil Matter 20-00066, Roe
4 versus United States of America, et al.

5 THE COURT: Good afternoon. This is a proceeding
6 that is hosted on our zoom platform. Our host for the
7 proceeding is Courtroom Deputy Clerk Jennifer Gaudet. I
8 also have on the line and taking down the proceedings
9 our Official Court Reporter, Rich Romanow, and certain
10 of my law clerks.

11 This is an official proceeding of the court. It
12 is open to the press and public. I do not know what
13 members of the press or public may be on the line, but
14 if any are, let me say to you, you are welcome having --
15 but you must understand that you must keep your
16 microphones muted and that the rules of court remain in
17 full force and effect, that is to say there is no
18 rebroadcast, taping, streaming, transcribing, or other
19 broadcasts of these proceedings.

20 Now with that stated, would counsel who think
21 they're going to argue, would you identify yourself and
22 who you represent, starting with the plaintiff.

23 MR. STRICKLAND: Good afternoon, your Honor,
24 Cooper Strickland for the plaintiff. And just for the
25 Court's information, I have my client present with me

1 just in case any issues come up that I need to discuss
2 with her.

3 THE COURT: Thank you, Mr. Strickland, and of
4 course she's welcome.

5 MR. BECK: Your Honor, this is Gill Beck,
6 Assistant United States Attorney. I will be arguing on
7 behalf of Chief Judge Gregory, Circuit Executive Ishida,
8 General Counsel of the Fourth Circuit. With me is
9 Rachael Westmoreland of the Federal Program's branch,
10 she will be arguing on behalf of the United States and 8
11 other federal defendants.

12 THE COURT: All right. Thank you.

13 MS. WESTMORELAND: Good afternoon, your Honor.

14 THE COURT: And that's it?

15 MS. SPAINHOUR: No, your Honor. This is Missy
16 Spainhour and I will be arguing on behalf of Attorney
17 Anthony Martinez, in his individual capacity, on the
18 **Bivens** claims.

19 THE COURT: And I thank you.

20 Now I have read all the materials in this case and
21 I believe that I am prepared for oral argument. All
22 we're arguing today are the various motions to dismiss.
23 Nothing else. With that said, it seems to me that oral
24 argument ought not exceed 20 minutes a side, and I'm
25 going to hold you to that.

1 The plaintiff, and I think I can fairly say this,
2 Mr. Strickland, you've got a fairly long road to hoe
3 here because your complaint is really innovative in
4 various ways, and so I think I'm going to start with
5 you.

6 Now you, defense counsel, everyone will understand
7 that if we do not have enough time to argue every point
8 that's been made in the briefs, nothing is waived. Any
9 point that is developed in briefing, it's my
10 responsibility to consider and deal with, but I'm going
11 to take 20 minutes a side for oral argument. So that's
12 20 minutes among the three defendants who are prepared
13 to argue.

14 I do want to start with you, Mr. Strickland,
15 because I think logic compels it, and here's why.

16 Your complaint, um, starts out, of course, or at
17 its basis alleges constitutional violations of the Fifth
18 Amendment, violations of Equal Protection, and
19 violations of Due Process. Giving all intendments in
20 favor of the complaint, as I must, I'm having trouble
21 seeing how you state a constitutional claim, even if we
22 could get into a new **Bivens** action, on either of those
23 grounds. So I really think that's where I would like
24 you to begin. If you would develop that for me, I would
25 be grateful.

1 MR. STRICKLAND: Thank you, your Honor.

2 As far as the -- well there's a Fifth Amendment
3 right to be free of discrimination in federal
4 employment, um, and that's in the **Davis** case law, a very
5 clear principle, um, you just cannot be discriminated at
6 work. In the context of the judiciary, you have a Due
7 Process right, um, because it -- EDR is the exclusive
8 remedy in order to figure out whether you've been
9 subject to discrimination and whether you're entitled to
10 any written --

11 THE COURT: Let me interrupt you. I find in these
12 zoom proceedings I can only ask my questions if I
13 interrupt, and please don't take that as brusque, I was
14 trying to have a conversation.

15 Your client, as to the defendants that are before
16 the Court now, is not claiming discrimination, what
17 she's claiming is retaliation for, um, making a
18 complaint or engaging in protected action by complaining
19 of discrimination. And, um, at least under the Equal
20 Protection aspect -- we'll get to Due Process in a
21 moment. But under the Equal Protection aspect of the
22 Fifth Amendment, as I understand the law of the Fourth
23 Circuit, it's not receptive to those claims on the
24 theory that -- that in order to have a constitutional
25 claim there has to be class-based discrimination.

1 Retaliation is not class-based, retaliation has nothing
2 to do with a protected class, it has to do with action
3 taken against one who engages in protected activity. So
4 goes the argument.

5 What do you say to that?

6 MR. STRICKLAND: Well I would say that this is not
7 a strictly retaliation-based claim. I mean if this is
8 kind of a segue to the **Wilcox** decision, we can discuss
9 that, but this is not a purely retaliation-based claim.

10 My client is asserting that from the time that she
11 was subject to discrimination and sexual harassment in
12 her FD office, throughout EDR, the complaint process,
13 that she was subject to discrimination.

14 THE COURT: Well it's not clear to me that you've
15 alleged that, it seems to me that you've alleged
16 retaliation here?

17 MR. STRICKLAND: I would disagree with that. I do
18 not believe -- retaliation in my mind it would seem that
19 you have the discrimination -- the discriminatory act,
20 the sexual harassment, and it kind of ends, you assert a
21 complaint based off it and then things happen because
22 you filed a complaint. But here I would just point out
23 that the defendants, in various capacities, they delayed
24 the investigation, they failed to disqualify the Federal
25 Defender, they burdened my complainant by denying her a

1 promotion, they put her on telework for over 6 months,
2 um, this conduct was continuing after her complaint.

3 THE COURT: But you see I understand that this is
4 a motion to dismiss, so at this stage I accept all of
5 that, that's at least factually that's well-pleaded,
6 you've asserted that, but that, at least as I understand
7 your complaint, that's conduct in retaliation for her
8 complaining of sexual discrimination. Simply saying,
9 "Well she complains of sexual discrimination and
10 therefore retaliation is, um, falls under the same
11 rubric," doesn't seem to be the law at least in the
12 Fourth Circuit. And you're right to refer to **Wilcox**,
13 um, but **Wilcox** would seem to cut against you in this
14 aspect.

15 MR. STRICKLAND: And I would just add a couple of
16 points here. As far as this being simply retaliation,
17 there was a conscious failure to act here, the
18 defendants had a duty to act, they assumed that
19 responsibility in order to essentially get to the bottom
20 of the discrimination and provide meaningful remedies
21 and relief, and meaningful review.

22 The **Wilcox** decision, it troubles me on a variety
23 of levels because I understand that it's pretty hard on
24 retaliation, this is not a purely retaliatory claim, but
25 I would point out it bothers me that that decision came

1 out after this case was filed and after this case was
2 subject to intercircuit transfer, and I would just point
3 out too it was authored by a judge who was in our
4 initial disclosures as having discoverable information.
5 That bothers me. And the fact that the Fourth Circuit
6 as a defendant can come up with case law that supports
7 their argument for dismissal or any other kind of relief
8 in this action is problematic.

9 THE COURT: Well you know that raises an
10 interesting point, you don't suggest that somehow I'm
11 not bound by the Fourth Circuit? The intercircuit
12 assignment assigns me to act as a district judge in the
13 Fourth Circuit.

14 Now I've done a fair number of intercircuit
15 assignments and I've always understood that I was
16 subject -- I mean and it's very basic, I am subject to
17 the decisions of the higher courts, and in this case the
18 higher court is the Fourth Circuit. That's not the only
19 case, of course, *Wilcox*, it does seem that that builds
20 on other cases in the Fourth Circuit supporting the
21 principle that I put out to you.

22 MR. STRICKLAND: And I would just go back and
23 reassert again, this is not a purely retaliation-based
24 claim, the discrimination continued the pre-EDR
25 complaint and post-EDR complaint. And there was, um,

1 coordinated efforts after the EDR complaint to ensure
2 that my client was burdened, that appropriate relief was
3 not taken. I mean we even have it down to like, um,
4 once the EDR complaint was filed, you had the Federal
5 Defender having the opportunity to appoint an
6 investigator.

7 THE COURT: Well now because I have to give all
8 intendments in favor of your complaint, so I'm asking,
9 you're saying that on the allegations I have here,
10 you're alleging that the conduct to which you make
11 reference here is because of her gender, among other
12 things, not just that she engaged in protected conduct
13 complaining of sexual harassment, but in fact they took
14 these actions -- you're saying to me, as an officer of
15 the court, that they took these actions because of her
16 gender? In part.

17 MR. STRICKLAND: Again it began when the quid pro
18 quo e-mail was sent. By example, um, you have a male
19 supervisor going to a female subordinate saying, "the
20 papers say" essentially, and that resulted in a chain of
21 events that passed through the Federal Defender whenever
22 he signed off on it and then to the Fourth Circuit as
23 well whenever they engaged in the conversion to an AUSA,
24 the pending promotion, and they denied my client the
25 promotion that she was entitled to based off her

1 anniversary date? Of all of those things, it's a
2 continuing course of conduct, it was, from beginning to
3 end, it just -- it was new defendants that came in and
4 became involved in the process.

5 This is not as simple -- this is not as simple as,
6 um, the First Assistant engaging in such sexual
7 harassment, it ended, my client filed a complaint, and
8 then she was somehow retaliated again for filing that
9 complaint. There were continuing actions in order to
10 burden my client and punish her for conduct that began
11 with the First Assistant.

12 And I would just say, as far as **Wilcox**, if that's
13 the holding, if that's controlling in the Court's
14 opinion, I think it sets forth the alternative here,
15 which is to allow my client to amend her complaint and
16 file or assert a First Amendment claim.

17 THE COURT: And what would be the basis of that
18 claim?

19 MR. STRICKLAND: That's what **Wilcox** identified as
20 the appropriate form of relief for a retaliation claim
21 in this context.

22 THE COURT: All right.

23 Now if you wouldn't develop the Due Process aspect
24 of your argument, what liberty or property interest here
25 is involved in the process?

1 MR. STRICKLAND: Well the Due Process interest is
2 -- there's several. I would say that the main one
3 though is that EDR is set up as the exclusive remedy for
4 employees that are subject to discrimination or other
5 misconduct, and you have a situation, at least with
6 federal defenders, where the CJA and the EDR plan
7 provide no jurisdiction for the Court -- for the Court
8 to consider these claims against an FDO office, and
9 everything else that we've alleged in the complaint, on
10 top of those problems, you have just basic procedural
11 safeguards that are failing.

12 Again I referenced before, it's as simple as the
13 Federal Defender got to pick the investigators. That's
14 extremely problematic. How are you ever supposed to
15 have a fair process in that situation when the
16 investigation -- by James Ishida's own admission, was
17 the basis for the disciplinary action under Chapter 9
18 and the adjudication right under Chapter 10?

19 THE COURT: But frequently in situations involving
20 a private employer, for example, if the employer has an
21 EDR process, it is the employer who, um, investigates,
22 um, but people independent of that -- those against whom
23 the complaint is made, and that's what happened here.

24 MR. STRICKLAND: No, I would disagree with that.
25 I don't think there's any disagreement at this point

1 that the targets of the EDR complaint were the First
2 Assistant and the Federal Defender. Now no matter how
3 this got corrupted after the complaint was filed,
4 whether the Federal Defender was investigated or not, is
5 kind of beside the point. Everyone understood at the
6 time that my client filed a claim, an EDR claim against
7 the Federal Defender, and under those circumstances this
8 is borrowing on Title VII principles. He's not --

9 THE COURT: You see that's it, you're absolutely
10 right, what you've done here is, um, borrowing Title VII
11 principles and jurisprudence and applying them to this
12 claim which reads -- which if it exists at all, it's got
13 to go forward as a new **Bivens** claim, straight out of the
14 Constitution.

15 What's the authority for importing into such a
16 claim the jurisprudence from Title VII?

17 MR. STRICKLAND: So I would just quote from **Davis**
18 at this point, "Litigation under Title VII of the Civil
19 Rights Act of 1964 has given federal courts great
20 experience evaluating claims for back pay due to illegal
21 discrimination." I think **Davis** is the model here. The
22 **Davis** court understood this as well, it was not going to
23 be simply applicable to members of Congress, it would be
24 applicable to the judiciary.

25 THE COURT: But no one says it's just applicable

1 to members of Congress, but it -- in **Davis** the factual
2 situation was strikingly different.

3 MR. STRICKLAND: I would disagree with that, I
4 would say that -- I know that much has been made about
5 the fact that it was a member of Congress, who was the
6 defendant here, but -- but it's not different in the
7 sense that -- well not different in a meaningful
8 constitutional way because what you're really looking at
9 here are what are the remedies for accepted service
10 employees, those without any other pathway for Article
11 III review of constitutional violations? I think that
12 you have **Webster**, you have **Elgin**, you have all of these
13 cases that sit there and say "You cannot preclude
14 constitutional review of constitutional" -- "or judicial
15 review of constitutional violations."

16 THE COURT: Mr. Strickland, I'm going to stick to
17 my time limits, you've got 5 minutes left.

18 Identify for me the liberty interest that you
19 think is invoked in your Due Process claim? And if it's
20 the law, and again you can correct me, but process is
21 not an end in itself, you cannot fashion a Due Process
22 claim out of the fact that you've been deprived of
23 process. At least that's how I understand it.

24 So what is it here?

25 MR. STRICKLAND: The liberty interest, quite

1 simply, is you have a federal employee, a citizen
2 employee, who retains their constitutional rights, and
3 they have freedom from discrimination in their
4 employment, and there ought to be some pathway for
5 relief, some way to review what the claims are. EDR is
6 not it. It is not an Article III court --

7 THE COURT: So this really, um, and I am
8 understanding you, you're making yourself clear. You
9 think **Davis** is the way forward here?

10 MR. STRICKLAND: I think **Davis**, at the end of the
11 day is primarily viewed as a **Bivens** claim, but it
12 provides tremendous insight into how you interpret the
13 Fifth Amendment with respect to gender discrimination.
14 And sexual harassment and those things are underneath
15 that umbrella. It is directly applicable. You have
16 freedom to be -- you are, as a federal employee, you
17 should be free of gender discrimination, discrimination,
18 sexual harassment, in your federal employment, and I
19 think **Davis** clearly states that.

20 And as far as the Due Process interest, I would
21 say again, when you have a system like EDR that does not
22 have adequate procedural safeguards, those typically
23 associated with a judicial proceeding -- there is
24 Supreme Court precedent on that, it's **Hannah v. Larche**,
25 we cited it in our proceedings. You have to have those

1 hallmarks of judicial procedural Due Process --
2 procedural safeguards.

3 THE COURT: You'd agree with me though that there
4 is no property interest in process alone, isn't that
5 right?

6 MR. STRICKLAND: No, I disagree with that. I know
7 that --

8 THE COURT: What's your strongest case on that
9 point?

10 MR. STRICKLAND: The defendants have made much of
11 that and I would just simply say that they have a point.
12 If you want to analogize this simply to like this is
13 just something in an employee handbook, that's fine, but
14 that is incorrect.

15 Give me one second here. (Pause.) But the
16 problem with that concept though is that they're dealing
17 with cases that are nondiscrimination-based adverse
18 employment actions, like you repeatedly showing up late
19 for work or something like that. And then the other
20 thing that I would point out is that in those instances
21 you have an opportunity for further judicial review of
22 whatever kind of decision is made in the administrative
23 process.

24 THE COURT: All right.

25 MR. STRICKLAND: Plus this Court has the

1 opportunity to provide equitable relief, um, for a
2 constitutional violation.

3 THE COURT: And what would you say that would be?

4 MR. STRICKLAND: The equitable relief?

5 THE COURT: Yes.

6 MR. STRICKLAND: Well the minimum it would be, I
7 would say, is a threshold, that you would have
8 reinstatement.

9 THE COURT: I thought she left that position to
10 take another position within the judiciary as a result
11 of the mediation process?

12 MR. STRICKLAND: Because the conditions of
13 employment became so burdensome that she was
14 constructively discharged from her employment. There
15 was no way that she was going to be able to stay at an
16 employer where people wear offensive Justice Kavanaugh
17 costumes to work, when they're saying, "Oh, you're on
18 telework for 6 months, let's go meet you at the Waffle
19 House," and jokes about "Where's Waldo?" and everything
20 else. It was clear that they were not going to provide
21 her any kind of relief where she could continue to do
22 her job.

23 THE COURT: All right, thank you, Mr. Strickland.

24 All right, we'll hear from the defendants. I
25 assume you figured out your own time, because I'm not

1 going to call time say at the end of 20 minutes.

2 Now really I have pressed Mr. Strickland on areas
3 that I found -- well I don't find anything on a motion
4 to dismiss, but areas where I consider that he has
5 difficulties in his argument. You need not -- well you
6 make your own arguments. But what I'd like for you to
7 develop is your argument about this new **Bivens** action.
8 If he gets beyond that -- let's say he gets the answers
9 to my questions and gets beyond that, um, isn't this a
10 case that at least ought go forward through discovery?
11 I'll hear the defense.

12 MR. BECK: Your Honor, this is Gill Beck, United
13 States Attorney for Chief Judge Gregory and General
14 Counsel Walter.

15 The analysis is provided by **Aldizetti** and
16 **Aldizetti** asks whether there is a meaningful difference?
17 There is a meaningful difference between **Davis vs.**
18 **Passman** in multiple ways. There's a meaningful
19 difference with regard to the new category of
20 defendants. There is a meaningful difference with
21 regard to the standard analysis of this claim, there was
22 a very specific discrimination claim involving the
23 Congressman. This is a conspiracy being alleged and
24 it's very very broad reaching all the way up to the
25 Eastern District of New York, the Director of the

1 Administrative Office, the Chief Judge of the Circuit
2 Court, the generality and specificity provides a
3 meaningful difference.

4 The rights of the officers provides a meaningful
5 difference under the **Forrester** analysis and **Atkinson vs.**
6 **Holder** and **Doe vs. Meron**. The statutory or legal
7 mandate under which they operate provides a difference.
8 And in this case, Chief Judge Gregory, Circuit Executive
9 Ishida, and General Counsel Walter, were, um,
10 implementing, administrating the EDR process of the
11 Fourth Circuit, totally different from what the
12 Congressman was doing.

13 In addition, the Civil Service Reform Act, a major
14 change in federal employment law, as reflected in the
15 Supreme Court case in **Bush vs. Lucas**, that is a
16 difference. Judicial independence is a meaningful
17 difference. This policy challenges a meaningful
18 difference. Why bring in Chief Judge Mauskopf and the
19 Administrative Judicial Counsel of the United States if
20 he's not challenging policy? All of those are
21 meaningful differences from **Davis vs. Passman**.

22 And with regard to **Aldizetti**, the Court emphasized
23 the new context is easily satisfied, as did the Fourth
24 Circuit in **Fund Hope**. A radical difference is not
25 required, even a modest extension, the Supreme Court in

1 **Aldizetti** said, and as the Fourth Circuit in **Fund Hope**
2 said, that's an extension, even a modest extension. And
3 in this case there's no question that there has been --
4 there is a meaningful difference from **Davis vs. Passman**,
5 that requires the Court to go to special factors.

6 And that's another big difference between **Davis**
7 **vs. Passman**. In the first three business cases special
8 factors were only considered in dicta, there was no
9 special factor -- um, there was mention of the debate
10 clause in dicta, but there was no special factor. There
11 are three -- there are three circuit courts that have
12 held that the special factor of the Civil Service Reform
13 Act is a bar to this action going forward.

14 THE COURT: But not the Fourth Circuit?

15 MR. BECK: No, your Honor, that's correct. The
16 Fourth Circuit, along with the Third Circuit, has said
17 that the EDR process is a bar, a special factor that
18 precludes the action from going forward. Now the Fourth
19 Circuit decision is an unpublic decision, but it does
20 indicate what the law of the Fourth Circuit is.

21 And in this particular case, there is a very very,
22 um, substantial EDR process. This individual is -- had
23 precluded, she voluntarily had withdrawn it, she would
24 have had to have built in her back pay, promotion, and
25 reinstatement, all kinds of remedies are listed there,

1 with the ability to have a review by a judge, which is
2 much better than you routinely have, an experienced
3 Article III judge, acting in an administrative capacity
4 but still entitled to absolute immunity, um, providing
5 that. So there are multiple reasons why she cannot go
6 forward with a **Bivens** action.

7 And the Supreme Court has indicated, very very
8 clearly, as has the Fourth Circuit, that this is a
9 different strategy than when **Bivens**, **Carlson**, and **Davis**
10 were decided. If decided now, some of the Supreme Court
11 justices said there may be a different result. But in
12 any event, it is disfavored to extend **Bivens**.

13 I would like to pass to my other counsel, but I
14 would like just like to --

15 THE COURT: That would be fine. Let me just ask
16 one discrete question.

17 You've cited this unpublished decision in your
18 papers?

19 MR. BECK: Yes, your Honor.

20 THE COURT: Fine. Thank you. Go ahead.

21 MR. BECK: With regards to the points, your Honor,
22 in that particular case is **Kostishak vs. Mannes**,
23 **Kostishak vs. Mannes**, it's a 1998 case, 145 F. 3rd 1325.
24 And to give you an example of a District Court, in, um,
25 the Fourth Circuit, the Eastern District of Virginia in

1 **Drone vs. Duff**, 2017 Westlaw 6383607, applied this same
2 analysis with regard to the Eastern District of Virginia
3 EDR plan and found that a different factor applied.

4 I'd like to go back to retaliation. Your Honor is
5 exactly right that **Wilcox vs. Lyons** is very important.
6 **Wilcox** just says retaliation for reporting alleged sex
7 discrimination -- on an employee was because of the
8 employee's report, not because of the employee's sex.
9 Another point in **Wilcox**, a retaliation claim of this
10 type thus does not implicate disparate treatment on the
11 basis of a classification within the Equal Protection
12 Clause.

13 Another question your Honor raised --

14 THE COURT: But what do you say -- what do you say
15 to his point that if I were to dismiss, it should be a
16 dismissal with leave to file a proposed amended
17 complaint to assert a First Amendment violation and then
18 we'll give you a chance to attack that. What do you say
19 to that?

20 MR. BECK: Your Honor, we would oppose that
21 because both the Supreme Court and the Fourth Circuit
22 have been very clear that the Supreme Court has never
23 ever allowed a First Amendment **Bivens** claim. So we
24 believe the law is very strong and it would be futile to
25 allow amendment.

1 Another question your Honor raised was the
2 relationship between Title VII and the Constitution, and
3 this is a case about the Constitution. But the **Wilcox**
4 case is also very important there. So the **Wilcox** court
5 said, "Thus, if Wilcox's retaliation claim was governed
6 by the Title VII framework, her claim provides
7 dismissal." But it did not because there is a different
8 standard, a constitutional standard.

9 And at this time I will defer to Missy Spainhour.

10 THE COURT: Fine. I'm happy to hear you. There's
11 about 11 minutes left. Go ahead.

12 MS. SPAINHOUR: I'll just take a few minutes so
13 that Ms. Westmoreland can give her argument.

14 Your Honor, I would say -- I represent
15 Mr. Martinez and I would say a couple of things with
16 regard to what Mr. Strickland just said.

17 The first is that he discusses how the Court has
18 the ability to impose equitable relief in this case.
19 That is not true as to the individual defendants. There
20 is Fourth Circuit case law on point that says that
21 individuals defendant cannot be subjected to equitable
22 relief.

23 THE COURT: He did not state that in that context
24 and I understand that to be the law.

25 MS. SPAINHOUR: Okay. I just wanted to be sure

1 about that.

2 I also wanted to talk about ***Davis vs. Passman*** a
3 little more. Even in that case the Court said that, um
4 -- it says "As a course, were Congress to create
5 equally-effective alternative remedies, the need for
6 damages relief may be obviated." Well right around the
7 same time the CSRA was enacted, the Congress and the
8 CSRA did not exclude or did not ignore judiciary
9 employees, they just put them in an excepted service
10 category, and then later judiciary employees of course
11 are entitled to receive back pay or other things like
12 that, which again had she gone through this process,
13 it's possible that she could have received those things
14 had she proven her claims. So I wanted to address that.

15 THE COURT: And just so we're clear, the "should
16 she have gone through this process" is the extant EDR
17 process which after mediation she withdrew from to take
18 another position. Those are the facts, correct?

19 MS. SPAINHOUR: That's correct. And also she did
20 not file another EDR process to try to, um, to try to
21 address her complaint of constructive discharge, which
22 she claims happened when she left after mediation. So
23 there was another --

24 THE COURT: Thank you. All right. We'll hear,
25 um, from counsel.

1 MS. WESTMORELAND: Thank you, your Honor. And as
2 Mr. Beck stated in the beginning, I'm representing the
3 Federal Defendants including the individual defendants
4 in their official capacities.

5 So in addition to the fact that, um, plaintiff has
6 failed to state a claim here for Equal Protection or a
7 violation of equal proceedings or Due Process, the fact
8 of the matter is that the Court doesn't have
9 jurisdiction to hear plaintiff's claims against the
10 federal entity defendants. The plaintiff has still not
11 identified a waiver of sovereign immunity and it's
12 axiomatic that this Court can either -- either there can
13 be no suit against the federal government or the
14 defendants in their official capacity without a waiver
15 of sovereign immunity, and that waiver simply does not
16 exist here. The Administrative Procedure Act exempts
17 courts of the United States, including their
18 auxiliaries, including the Federal Public Defender's
19 Office, which is connected to the federal court system
20 by statute. The Act does not provide a waiver of
21 sovereign immunity because no appropriate authority has
22 first found the employee to have suffered an illegal
23 action as would be required. The EDR plan itself cannot
24 provide a waiver of sovereign immunity because it's
25 simply an administrative proceeding and doesn't

1 implicate a suit against the United States in federal
2 court. 20 USC 1331 simply provides for the subject
3 matter jurisdiction this Court can hear it, it has
4 absolutely nothing to do with sovereign immunity or the
5 ability of court claims to be heard against the United
6 States. And the **Larson Duggan** exemption does not apply
7 here. To the extent it wasn't waived by the
8 Administrative Procedure Act, in any event she doesn't
9 allege the sort of heightened standard required. So for
10 those reasons, um, there can be no suit against the
11 United States for money damages or equitable relief.
12 And for that reason alone, this Court should grant the
13 federal defendants' motion to dismiss.

14 But even putting sovereign immunity aside, the
15 CSRA concludes that --

16 THE COURT: Well let me stop you -- let me stop
17 you there for a second here. Because I started at least
18 where I thought it was logical to start, which was has a
19 constitutional violation been alleged? And counsel and
20 I went back and forth on that and he has answered my
21 questions and I have to consider that.

22 You launch in saying, "Wait one second, Judge,"
23 and you're saying it very well and respectfully, but
24 you're saying "You don't have subject matter
25 jurisdiction here because at least as to the federal

1 employees in their official capacities, they are
2 employees" -- well judges don't like to consider
3 themselves employees, but "they are officers of the
4 government of the United States." And so when I come to
5 address this, actually you would say that your argument
6 has to get top-billing, that is whatever I think about
7 these other things, um, I simply cannot go forward, as
8 you've developed it, absent a waiver of sovereign
9 immunity as to these people in their official
10 capacities, because there has been no waiver. Have I
11 got your argument right?

12 MS. WESTMORELAND: That's correct, your Honor.

13 THE COURT: All right. And now you've got about 3
14 minutes left for the fallback in case I don't agree with
15 that. Go ahead.

16 MS. WESTMORELAND: Well I'll sum it up pretty
17 quickly.

18 You stated at the beginning that you've read all
19 of the briefing, which there's been quite a bit of in
20 this case, but even if your Honor were to find that
21 sovereign immunity has been waived, the CSRA clearly
22 precludes any sort of claim outside of the framework by
23 the CSRA. And this has been recognized in **Elgin** and
24 **Fausto** by the Supreme Court. The arguments the
25 plaintiff makes simply -- they just don't make sense.

1 For example, they say through the statutory
2 provision that talks about specific discrimination
3 statutes, it has really nothing at all to do with
4 constitutional claims. And there's the legislative
5 history and the fact that this has gone back and forth
6 between the court and the judicial branch and Congress
7 and Congress had many opportunities to amend the CSRA
8 and chosen not to even when it applied certain
9 employment discrimination laws to itself. And then
10 finally plaintiff makes this argument that somehow this
11 interpretation of the CSRA is a constitutional violation
12 in itself, and that also simply doesn't really make
13 sense. **Webster v. Doe** does stand for the proposition
14 that, you know, courts should have some sort of
15 heightened scrutiny lens considering whether Congress
16 precluded constitutional claims. But that requires a
17 predicate showing that there's no judicial forum.

18 And so here there is an EDR process where
19 experienced Article III judges, albeit acting in their
20 administrative capacities, who can order discovery,
21 order all the sorts of relief that plaintiff is seeking
22 here. She still hasn't identified any relief that the
23 judicial officers could not have given her through the
24 EDR process, and that can -- that decision of the
25 judicial officer through the EDR process, there is an

1 opportunity for further sort of review of that decision.

2 So with all that and the separation of powers
3 issues, um, that are outlined in **Buckley**, in **Semper**, and
4 **Dotson**, if your Honor wants to refer to those cases for
5 a more fulsome explanation of those issues.

6 THE COURT: Thank you. I think I have the
7 argument.

8 MS. WESTMORELAND: All right.

9 THE COURT: Let me tell you how we're going to
10 proceed here. And I don't want anyone to take any
11 comfort, anyone, plaintiff or defendant, to take any
12 comfort from what I am going to say now. I'm going to
13 enter the following order and here it is. This case is
14 stayed until I enter at least an order, and hopefully a
15 memorandum of decision, on the motion to dismiss.

16 Now this has been very ably argued by all four
17 counsel who have argued. I am grateful not only for
18 your argument, but for your comprehensive briefing. I
19 take my responsibilities very seriously, I am a visiting
20 judge in this district, in the Fourth Circuit, so I will
21 tell you I believe I am bound by the law, under stare
22 decisis I am bound by the decisions of the Fourth
23 Circuit, but that is not the circuit in which I have
24 routinely practiced, and so what I'm going to do is take
25 this matter under advisement. And having taken it under

1 advisement, we've really uncovered that I am not even
2 clear where to start the analysis. But I'm going to
3 figure that out. And as soon as I can reasonably, in a
4 deliberate way, do it, I will enter an order and a
5 memorandum of decision.

6 So don't think that this is prejudging the case,
7 because it's not. Yes, I have read everything. I am
8 one who believes in oral argument and oral argument here
9 has been extraordinarily helpful and I appreciate
10 counsels' devotion as advocates. Now the ball is in my
11 court. Everything is stayed until I make an order. And
12 if anything is going forward, at that time we can figure
13 out the orderly method in which it will go forward.
14 Again with my thanks we'll take the matter under
15 advisement and we'll stand in recess. Thank you.

16 (Ends, 2:50 p.m.)
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C E R T I F I C A T E

I, RICHARD H. ROMANOW, OFFICIAL COURT REPORTER,
do hereby certify that the foregoing record is a true
and accurate transcription of my stenographic notes
before Judge William G. Young, on Monday, November 23,
2020, to the best of my skill and ability.

/s/ Richard H. Romanow 01-22-21

RICHARD H. ROMANOW Date